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IN THE
SUPREME COURT
OF THE UNITED STATES
October Term: 2001

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Petitioner

v.

WAFFLE HOUSE, INC.
Respondent

On Writ of Certiorari
to the
United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICI CURIAE MARYLAND COMMISSION ON HUMAN RELATIONS CONNECTICUT COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES IOWA CIVIL RIGHTS COMMISSION KANSAS HUMAN RIGHTS COMMISSION KENTUCKY COMMISSION ON HUMAN RIGHTS MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION MICHIGAN DEPARTMENT OF CIVIL RIGHTS NORTH CAROLINA HUMAN RELATIONS COMMISSION RHODE ISLAND COMMISSION FOR HUMAN RIGHTS

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INTEREST OF THE STATE OF MARYLAND COMMMISSION ON HUMAN RELATIONS, ET AL., AS *AMICI CURIAE*

The State of Maryland Commission on Human Relations ("MCHR") files this *amici curiae* brief with the written consent of all parties.[1] An *amici curiae* brief stating the position of MCHR, one of over forty (40) state fair employment practices agencies throughout the nation that enforce state anti-discrimination laws, will bring to the Court's attention relevant matters not already brought to its attention by the parties in this action and will be of considerable help to the Court. *See* SUP. CT. R. 37.1.

MCHR has a strong interest in the resolution of the issues in this action. In *EEOC v. Waffle House, Inc*, the United States Court of Appeals for the Fourth Circuit held that an arbitration agreement between a charging party and his employer, subject to the Federal Arbitration Act, ("FAA") does not require the United States Equal Employment Opportunity Commission ("EEOC") to arbitrate the claim and does not preclude EEOC filing suit in federal court to obtain large scale injunctive relief under Title VII

[1] No counsel for any party authored this brief in whole or part. No person, other than amicus curiea, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. SUP. CT. R 37.6

of the Civil Rights Act of 1964, 42 U.S.C.2000c *et seq.* (Title VII). *EEOC v. Waffle House, Inc.*, 193 F.3d 805, 811-813 (1999). However, the Fourth Circuit held an arbitration agreement between the charging party and the employer bars EEOC from seeking backpay, reinstatement, and compensatory and punitive damages, so called "make whole" relief, in federal court under Title VII. *Id.* at 812.

Title VII and Maryland's anti-discrimination statute, Maryland Annotated Code, Article 49B, both create the right to be free from employment discrimination, by way of an exception to the terminable at will doctrine, and remedies for enforcing that exception. *Makovi* v. *Sherwin-Williams Co.*, 561 A.2d 179, 190 (Md. 1989). This Court has recognized that Article 49B is modeled on Title VII and is typical of statutes in some 30 states. *Burnett* v. *Grattan*, 468 U.S. 42, 51 (1984).

State fair employment agencies and state anti-discrimination statutes play an important role in the enforcement of Title VII. The states' enforcement of state laws prohibiting employment discrimination is interrelated and complementary to the national enforcement of Title VII. *New York Gaslight Club. Inc. v. Carey*, 447 U.S. 54, 65 (1980). Title VII establishes a

federal-state enforcement scheme under which EEOC shares responsibility for enforcement of employment discrimination complaints with state agencies with which it has work-sharing agreements. *EEOC v. Techalloy Maryland, Inc.*, 894 F.2d 676, 677-78 (4th Cir. 1990); 29 C.F.R. § 1601.74.

MCHR has a work-sharing agreement with EEOC similar to those EEOC has entered into with state and local agencies throughout the country. *Techalloy*, 894 F.2d at 677-678. The purpose of work-sharing agreements is to "minimize duplication of effort in the processing of charges and to achieve maximum consistence of purpose and results." *Id.* at 678. Complaints filed with MCHR are dual-filed with EEOC and are handled pursuant to the State's administrative process under Article 49B.

Amici have grave concerns if EEOC's ability to seek full relief is found to be impeded by arbitration agreements. This concern is based not only on the ability of our enforcement ally to obtain full relief, but also on the devastating effect on state

enforcement if the same limitations are applied to the states. [2] Because state agencies and their laws have such an important role in Title VII's enforcement, limitation on their ability to obtain "make whole" relief would seriously undermine both state *and* federal enforcement of anti-discrimination laws.

SUMMARY OF ARGUMENT

MCHR enforces Article 49B to vindicate the State's interest. MCHR's role in the procedure established by Article 49B is essential to the enforcement of state anti-discrimination laws, as well as federal laws. The decision in *Waffle House*, if read to prohibit state enforcement agencies from seeking "make whole" relief from persons found to have engaged in unlawful discrimination under state law, whenever the respondent has a private arbitration agreement with the complainant, would preclude enforcement of State law. To preclude enforcement of state anti-discrimination laws would, in turn, seriously undermine enforcement of Title VII.

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[2] That the rationale of *Waffle House* may be extended to state and local enforcement agencies such as MCHR is not hypothetical. *Merrill Lynch, Pierce, Fenner and Smith, Inc. v. Nixon*, 210 F.3d 814, 818, 819 (8th Cir. 2000), *cert. denied*, __ U.S. __, 121 S. Ct. 383 (2001)(following *Waffle House* in affirming a district court's order enjoining the Missouri Human Rights Commission from seeking individual monetary damages on behalf of an employee whose claims of discrimination had been subjected to mandatory arbitration.

ARGUMENT

I.

THE STATE'S INTEREST IN OBTAINING "MAKE WHOLE" RELIEF IN A STATE ADMINISTRATIVE PROCEEDING FROM A RESPONDENT WHO VIOLATES STATE LAW MAY NOT BE ABROGATED BY THE RESPONDENT'S PRIVATE ARBITRATION AGREEMENT TO WHICH THE STATE IS NOT A PARTY

A. Maryland Has An Historic and Vital Interest In Protecting Its Citizens From Unlawful Discrimination

The State of Maryland has an historic and vital interest in protecting its citizens from unlawful discrimination under state law. Under Article 24 of the Maryland Declaration of Rights, Maryland citizens may not be subject to unequal treatment of the laws. MD. CONST., Decl. of Rights, art. 24. *See also* R.I. CONST., art. I, § 2; CONN. CONST., art. I, § 20. The Maryland Courts have recognized that the concept of equal protection embodied in Article 24 and the concept of equal protection under the Fourteenth Amendment of the United States Constitution are *in para materia*. *Hornbeck v. Somerset Bd. of Educ.*, 458 A.2d 758. 768 n.4 (1983). The Maryland Constitution also provides that Maryland citizens may not be subject to different treatment based on sex. MD. CONST., Decl. of Rights, art. 46. The Court of Appeals of Maryland has "consistently held that a public official

who violates the plaintiff's rights under the Maryland Constitution is personally liable for compensatory damages." *Ritchie v. Donnelly*, 597 A.2d 432, 445 (1991).

Maryland's statutory anti-discrimination law applies to public and private employers. Md. Ann. Code, art. 49B § 7. The State enacted Article 49B "to protect the rights of all Maryland residents in three major areas--housing, employment, and public accommodations." *University of Maryland v. Boyd*, 612 A.2d 305, 309 (Md. 1992); *see e.g.* R.I. GEN. LAWS. §§ 28-5-17, 28-5-2, 28-5-5, CONN. GEN. STAT. §§ 46a-60, 46a-64, and 46a-64c. Maryland's fair employment practice law was enacted over 35 years ago, in 1965 by Chapter 67, Acts of 1964. By Chapter 83, Acts of 1968, MCHR was established and given its present name. MCHR is a duly-constituted, independent agency of the State of Maryland, charged with enforcing Article 49B. Under Article 49B, MCHR "is charged with overseeing all aspects of human relations for the residents of Maryland." *Boyd*, 612 A.2d at 309.

Article 49B, § 14 provides:

> It is hereby declared to be the policy of the State of Maryland, *in the exercise of its police power for the protection of the public safety, public health and general welfare,* for the maintenance of business and good government and for the promotion of the State' s trade, commerce and manufacturers to assure all persons equal opportunity in receiving employment in all labor management-union relations regardless of race, color, religion, ancestry or national origin, sex, age, marital status, or disability unrelated in nature and extent so as to reasonably preclude the performance of the employment, and to that end *to prohibit discrimination in employment by any person, group, labor organization, organization or any employer or his agents.*

Md. Code Ann., art. 49B, § 14 (emphasis added). Maryland's highest court has held that this provision establishes a clear mandate of public policy. *Molesworth* v. *Brandon*, 678 A2d. 608, 616 (Md. 1996). As a matter of public policy, the Maryland Legislature has determined that an employer who unlawfully discriminates should bear the cost of any unemployment caused by the discrimination, whether or not the complainant is reinstated. Md. Ann. Code, art. 49B, § 11(e).

Under Article 49B, Maryland's policy against discrimination includes not only the prohibition of specified discriminatory acts, but also the specific enforcement mechanisms: investigation, conciliation, and prosecution, designed to resolve complaints of employment discrimination at the earliest opportunity, without resort to the courts. Md. Ann. Code, art. 49B, *et seq.* The enforcement mechanism created by Article 49B §§ 9A, 10, 11, and 12 is the *exclusive process* by which an employer may be found to have violated the provisions of Article 49B. *Md. Comm'n on Human Relations v. Downey*, 493 678 A.2d 55, 79 (Md. App. 1996).

B. Article 49B Creates Not Only A Right, But A Remedy For Unlawful Discrimination

Article 49B creates not only a right to be free from unlawful discrimination, but the means by which MCHR must proceed, through an administrative procedure, to enforce that right as the representative of the citizens of Maryland. Md. Ann. Code, art. 49B, §§ 10, 11; *See Makov*, 561 A.2d at 190. Article 49B contains an investigation and enforcement scheme that is quite similar to the procedure established by § 10 of the National Labor Relations Act. *Downey*, 678 A.2d at 79. The administrative

procedure mandated by Article 49B emphasizes efficient resolution of discrimination complaints.

Article 49B, § 10(a) mandates that: "After the filing of any complaint the Executive Director shall consider the complaint and refer it to the Commission's staff for prompt investigation." Md. Code Ann., art. 49B, § 10(a); *See Banach v. State Com'n on Human Relations*, 356 A.2d 242, 249 (Md. 1976) (recognizing that Article 49B emphasizes "the investigatory function of the Commission"). The investigator is authorized to conduct fact finding conferences, to serve interrogatories, and to issue subpoenas ad testificandum or duces tecum to aid in the investigation. MD. REGS. CODE tit. 14.03.01.04.

The investigation is "conducted in confidence and without publicity," and unless the case reaches the public hearing stage, MCHR is required to hold confidential any information related to the investigation, as well as the identities of the complainant and respondent. Md. Ann. Code, art. 49B, § 13(a). Based on the entirety of the investigation, MCHR makes a determination, set forth in a written finding, of whether there is probable cause to believe that illegal discrimination has taken place or is taking place. *Id.* § 10(b); MD. REGS. CODE tit. 14.03.01.06. If MCHR

finds no probable cause, the complainant may make a request for reconsideration to the Executive Director. MD. REGS. CODE tit. 14.03.01.06C. If the investigator finds that probable cause exists to believe that discriminatory acts are being committed, MCHR "immediately shall endeavor to eliminate the discrimination by conference, conciliation, and persuasion. . . ." Md. Ann. Code, art. 49B, § 10(b). Only when there is probable cause found *and* a failure to reach an agreement to eliminate the unlawful discrimination, is the complaint certified to proceed to the public hearing stage.

When MCHR's Executive Director certifies the case for public hearing, MCHR's general counsel files a statement of charges in support of the complaint, in the name of MCHR, with the State Office of Administrative Hearings, "requiring the respondent to answer the charges of the complaint at a public hearing before a hearing examiner at a time and at a place certified in the notice." *Id.* § 11(a); MD. REGS. CODE tit. 14.03.01.08A, B. "The case in support of the complaint shall be presented at the hearing by the general counsel of the Commission." Md. Ann. Code art. 49B, § 11(a). In an Article 49B administrative proceeding, the complainant's interests are interrelated with those

of the State, which is represented by MCHR's general counsel. While MCHR and the Complainant are separate parties, MCHR general counsel advocates for the interests of both at the adjudicative stage. *See* MD. REGS. CODE tit. 14.03.01.09C. Similar to a criminal prosecution, the complainant is the State's primary witness.

The hearing examiner "shall be an attorney who is qualified by experience to handle discrimination cases of the type arising under this article." Md. Ann Code, art. 49B, § 2(b). MCHR has delegated the function of hearing and adjudicating Article 49B cases to the State of Maryland Office of Administrative Hearings. MD. REGS. CODE tit. 14.03.01.08B(1).

If the respondent is found to have engaged in any discriminatory act within the scope of Article 49B, the Administrative Law Judge *must* require the respondent to cease and desist from the discriminatory act *and* to take affirmative action to effectuate the purposes of the particular subtitle. Md. Ann. Code, art. 49B, § 11(e). Because the State has an interest in the respondent, as opposed to the citizens of the State, bearing the cost of any unemployment caused by the respondent's unlawful discrimination, Article 49B provides that MCHR may seek to

recover relief in the form of backpay for the complainant's lost wages, with or without reinstatement. *Id.* There is no ability to recover monetary damages other than for lost wages. *Id.* The complainant has no independent right under Article 49B to file an employment discrimination action in court.[3]

A party dissatisfied with the decision of an Administrative Law Judge may appeal to an Appeal Board composed of three MCHR Commissioners, who make the final administrative decision. MD. REGS. CODE tit. 14.03.01.10. Article 49B's carefully crafted mechanism for the investigation and resolution of employment discrimination claims, includes judicial review of a decision unfavorable to the employer. *See Downey*, 678 A.2d at 71.

[3] Article 49B does authorize direct civil actions, under certain circumstances, by persons subjected to discrimination prohibited by local codes of four Maryland Counties. Md. Ann. Code, art. 49B. §§ 42, 43. Article 49B also authorizes civil actions in state court under its housing discrimination subtitle. *Id.* §§ 32, 33,34.

C. **To Hold That State Enforcement Agencies, Such As MCHR, Which Vindicate The Public Interest -- State, As Well As Federal -- Are Precluded From Requiring A Respondent To Provide "Make Whole" Relief For Unlawful Discrimination In *State Administrative Actions* When A Respondent Has A Private Arbitration Agreement, To Which The State Is Not A Party, Would Leave State Interests Unenforceable And Be An Unwarranted Federal Intrusion On State Law**

While a component of a comprehensive national civil rights enforcement scheme, Article 49B is a state administrative anti-discrimination process enacted to enforce the public policy of Maryland, for which the federal proceedings are supplements to the available state remedies for employment discrimination. *See New York Gaslight Club*, 447 U.S. at 63-65. To prevent states from seeking "make whole" relief, in state administrative proceedings, from persons found to have engaged in unlawful discrimination against state citizens under state law, whenever the respondent had a private arbitration agreement with the complainant, would preclude MCHR from enforcing state law under Article 49B, in addition to seriously undermining enforcement of Title VII through unwarranted federal interference with enforcement of state anti-discrimination laws.

1. **MCHR Is An Indispensable Party In Every Action Under Article 49B**

Unlike Title VII, Article 49B is a purely administrative process in which MCHR is an indispensable party. Under Article 49B, MCHR pursues administrative remedies by certifying the case for public hearing and filing a statement of charges for every employment discrimination case in which probable cause has been found whenever the case cannot be conciliated. MD. REGS. CODE tit. 14.03.01.08A & B. "The Commission that files the charge under [MD. REGS. CODE tit. 14.03.01.08B] seeking appropriate relief for an aggrieved party and the public interest" is a party to the proceeding. MD. REGS. CODE tit. 14.03.01.09C.

> This Court has spoken directly on the differences between the Article 49B administrative process and litigation under the federal civil rights acts. In *Burnett*, this Court held that the six-month filing period for complaints under Article 49B was not applicable to actions brought under 42 U.S .C. § 1981 *et seq. Burnett*, 468 U.S. at 55. The Court emphasized the "strikingly different" roles played by complainants in administrative complaints filed with MCHR under Article 49B and by litigants under the federal civil rights acts. *Burnett*, 468 U.S. at 51. As the Court stated:
>
> A person's sole responsibility under this scheme is to "make, sign and file with the Human Relations Commission. . . a complaint in writing under oath." Md. Ann. Code, Art. 49B, § 9(a). The complaint need contain no more than the name and

> address of the person or entity alleged to have committed the discriminatory act, "the particulars thereof," and "other information as may be required from time to time by the Commission." MCHR has delegated the function of hearing and adjudicating Art. 49B cases to the Maryland Office of Administrative Hearings. Although the complainant is potentially liable for a malicious filing, § 12(b), he has no obligation to investigate his allegations more fully. *The entire burden of investigating and developing the case rests on the Human Rights Commission,* which is empowered to issue subpoenas, conduct hearings, and seek judicial enforcement of its orders. §§ 11-12.

Id. (emphasis added).

Thus, it is clear that, under the administrative enforcement process created by the Maryland Legislature for cases of unlawful discrimination, the State, not the complainant, assumes the role of the "litigant," *i.e.*, the State, represented by MCHR general counsel, is the one authorized to enforce Article 49B through *investigation, negotiation and filing formal charges.* 468 U.S. at 57 (MCHR "[a]fter receiving notice of the complaint essentially assumes the role of litigant.").

2. Article 49B's Anti-Discrimination Enforcement Procedure Is Entirely Compatible With The Purpose Of The FAA

Undoubtedly, the FAA preempts any conflicting state legislation. *Southland v. Keating*, 465 U.S. 1 (1984). The FAA was originally enacted in 1925 and its basic purpose was to overcome the hostility of the courts to the enforcement of written agreements to arbitrate. *Allied-Bruce Terminix Companies v. Dobson*, 513 U.S. 265, 273 (1995). It was passed to "place such agreements 'upon the same footing as other contracts.'" *Id.* at 271 This Court has made clear that a party does not forgo substantive rights under the FAA: "it only submits their resolution in an arbitral, rather than a *judicial* forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)(emphasis added).

Article 49B's administrative enforcement process, to investigate and attempt to resolve employment discrimination cases without resort to the courts, is entirely compatible with the purpose of the FAA. As the State agency designated to enforce Article 49B, MCHR has the expertise in handling allegations of discrimination. *State Com'n on Human Relations v. Washington County Community Action Council, Inc.*, 476 A.2d 222, 227 (Md.

App. 1984). The remedy available through the administrative process may be more desirable than the judicial process because it sometimes is more expedient and less expensive and because of the administrative agency's expertise in uncovering discriminatory practices. *Makovi*, 561 A.2d at 199 (Adkins, J., dissenting)(citing Art. 49B, §§ 9-12).

The administrative procedure may also be more desirable because the State bears the cost, whereas an arbitration agreement which requires the employee to bear the cost of arbitrator's fees may create a disincentive to arbitrate. *See Bradford v. Rockwell Semiconductor Systems, Inc.*, 238 F.3d 549, 559 (4th Cir. 2001) (holding that an agreement requiring the discrimination complainant to pay half the arbitrator's fees and costs (which can be in the thousands) does not render the agreement *per se* unenforceable); *Ackerman* v. *The Money Store*, 728 A.2d 873, 878 (N.J. Super. 1998) (the court refused to order a plaintiff to arbitrate his disability discrimination claims under the New Jersey Law Against Discrimination, in so doing the Court stated: "The rights granted under Section 13 are not minor provisions of the [Law Against Discrimination] but represent the means by which an injured party who experiences discrimination may act . . . . By

proceeding administratively, an employee does not have to hire an attorney and incur the costs which otherwise may deter him or her from pursuing a discrimination claim.").

Although the State clearly has determined that the administrative procedure established by Article 49B is the most desirable way to enforce its anti-discrimination laws, nothing in Article 49B prohibits an individual from entering into a private agreement to arbitrate. *See, e.g., Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302, – U.S. — (2001); *cf. Wright*, 525 U.S. at 78 (no presumption of arbitrability under Labor Management Relations Act, "beyond the principle rationale that justifies it, which is that arbitrators are in a better position *than courts to interpret the terms of a CBA*.") (emphasis added). Nor does Article 49B prohibit the State from entering into an arbitration agreement.

However, an agreement to arbitrate, covered by the FAA, to which the State is not a party, cannot deprive the State of its interest in requiring respondents engaged in unlawful discrimination under state law to provide "make whole" relief to the victims of discrimination. Indeed, barring the State from pursuing its substantive enforcement rights under the *administrative process* provided under Article 49B would be

contrary to the purposes of the FAA. *See Mitsubishi Motors Corp.*, 473 U.S. at 628.

3. A Private Arbitration Agreement To Which The State Is Not A Party Does Not Cover The State's Statutory Right To Pursue Its Administrative Remedies

It would be an unwarranted federal intrusion on State law to allow an agreement, covered by the FAA, to which the State is not a party, to preclude the State from pursuing the State's administrative remedies. Only a party to the arbitration agreement that falls within the scope of the FAA can enforce that agreement under the FAA. *See Arrants v. Buck*, 130 F.3d 636, 640 (4th Cir. 1997); *Holmes v. Coverall North America, Inc.*, 649 A.2d 365, 369-70 (1994) (arbitration clause severable portion of a contract, which is enforceable in arbitration so long as parties exchange mutual promises to arbitrate disputes under the contract and each promise provides consideration for the other). If MCHR is forced by a private agreement to which the State is not a party to forgo the State's right under Article 49B to seek reinstatement or backpay, the State's interest in remedying unlawful employment discrimination would be rendered unenforceable. *Id.*

Article 49B *requires* that the employer *both* cease and desist the discrimination *and* take *affirmative action to effectuate the purpose of the subtitle*, including providing backpay, with or without reinstatement. Md. Ann. Code art. 49B, § 11(e). "If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality." *Albemarle Paper Company v. Moody*, 433 U.S. 405, 417 (1974). Backpay awards serve two important functions: they make victimized employees whole for the injuries suffered as a result of past discrimination, and they deter future discrimination. *Id.* at 417-419.

In *Moody*, this Court emphasized the deterrent function of a backpay award. Noting that "the primary objective [of Title VII] was a prophylactic one," the Court explained:

> It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in the country's history.'"

Id. at 417-418 (quoting *United States v. N. L. Industries, Inc.*, 479 F.2d at 354,379 (8th Cir. 1973)) (emphasis added); *See also McKennon* v. *Nashville Banner Publishing Co.*, 513 U.S. 352, 362

(1995)(barring any recovery of backpay "would undermine the ADEA' s objective of forcing employers to consider and examine their motivations, and of penalizing them for employment decisions that spring from age discrimination.").

The State's interest in the respondent, as opposed to the State, bearing the cost of unemployment caused by unlawful discrimination cannot be represented by a private individual in a private arbitration agreement. An employee's private arbitration agreement with his employer may preclude *him* from filing suit in court against his employer under federal statute. *Gilmer*, 500 U.S. 20 (1991)(addressing ADEA: "*having made the bargain to arbitrate, the party should be held to it* unless Congress itself has evinced an intention to preclude waiver of *judicial remedies* for the statutory rights at issue." *Id.* at 26)(emphasis added). However, "[t]his is not to say that all controversies implicating statutory rights are suitable for arbitration." *Mitsubishi*, 473 U.S at 626.

A private arbitration agreement between an employer and its employee to which the State is not a party simply is not susceptible of an interpretation that covers the State's statutory right to pursue its remedies in a state administrative proceeding because there is no agreement by MCHR to arbitrate according to

common law principles. *See Arrants*, 130 F.3d at 640; *See also Wright*, 525 U.S. at 78 (arbitration clause not susceptible of an interpretation that covers asserted dispute). The FAA places agreements to arbitrate upon the same footing as contracts. *Dobson*, 513 U.S. at 273. As with any other contract, in an agreement to arbitrate, the parties' intentions control. *Mitsubishi*, 473 U.S at 626; *Holmes*, 649 A.2d at 370 ("Once a Court determines that the making of an agreement to arbitrate is not in dispute, its inquiry ceases, as the *agreement to arbitrate has been established as a valid and enforceable contract.*").(emphasis added). Even though arbitration has a favored place, there still must be an underlying agreement between the parties to arbitrate. *See Arrants*, 130 F.3d at 640.

The rights asserted under Article 49B by MCHR, which is not a party to an arbitration agreement, arise not out of contract, but *purely by statute*. Accordingly, there simply can be no contractual right coexistent with the State's statutory right at question for an arbitrator to consider under the FAA. *See Wright*, 525 U.S. at 78-79; *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 462 (1999)("courts may not treat the agreement of a

private party to arbitrate her action as the agreement of the EEOC to arbitrate its action.").

When a State in the exercise of its police power for the protection of the public safety, public health and general welfare has determined that a person found to have committed unlawful discrimination under state law should pay for loss of employment opportunities, an arbitration agreement between a charging party and an employer, subject to the FAA, does not require *the State* to arbitrate and the State cannot be precluded by that private agreement from pursuing *the State's interests* in *state administrative proceedings* that are not hostile to the FAA. The State does not waive its right to enforce its law in a *state administrative forum* simply because a complainant signed an arbitration agreement. *See Wright*, 525 U.S. at 80 (waiver in collective bargaining agreement of right to *judicial* forum for ADA claim not "clear and unmistakable"); *Gilmer*, 500 U.S. at 26 (party to arbitration agreement may waive *that party's judicial* remedies).

II.

UNWARRANTED FEDERAL INTERFERENCE WITH ENFORCEMENT OF STATE ANTI-DISCRIMINATION LAWS WOULD SERIOUSLY UNDERMINE ENFORCEMENT OF TITLE VII

The Fourth Circuit's error in *Waffle House* was in not recognizing that the authority to determine who should bear the cost of compensation for unlawful discrimination is a matter of public interest essential to effective enforcement of Title VII through state enforcement of state laws in state administrative proceedings. *See, e.g.*, Md. Ann. Code art. 49B, § 11(e); *see Moody*, 422 U.S. at 417-24 (threat of award of monetary damages important to effective enforcement); *Frank's Nursery & Crafts*, 117 F.3d at 485 (when EEOC seeks to recover backpay for individuals, it sues "in its sovereign capacity" and does not stand "in the shoes of the individuals" (quoting *Occidental Life Ins. v. EEOC*, 432 U.S. 355, 381 (1977)(Rehnquist, J. dissenting); 29 C.F.R. § 1601.74. While acknowledging that the EEOC "acts in the public interest, even when enforcing only the charging party's claim," the Fourth Circuit erroneously found that the EEOC's "public interest is minimal" when it seeks "make whole" relief for a charging party (as opposed to when it pursues "large scale

injunctive relief'). *Id.* at 812. The Fourth Circuit's conclusion is not only lacking in authority, but is at odds with the principles established by this Court many years ago.

This Court has never considered "make whole" relief to be a "private" rather than "public" interest. "Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the [NLRB] enforces." *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177,197 (1941) (National Labor Relations Act). The relief provisions of Title VII (and for that matter, Art. 49B) were modeled on the relief provisions of the National Labor Relations Act. As discussed above, this Court has recognized the importance of backpay awards to both make victimized employees whole for the injuries suffered as a result of past discrimination and to deter future discrimination. *Moody,* 433 U.S. at 417-419 (1974); *Cf. Franks* v. *Bowman Transportation Company, Inc.,* 424 U.S. 747,768 n. 28 (1976) (Rejecting argument that seniority relief implicates only the "make whole" objective of Title VII and does not serve the "primary objective" of eradicating discrimination; "[S]eniority relief cuts to the very heart of Title VII's primary objective of

eradicating present and future discrimination in a way that backpay, for example, can never do.").

State remedies for discrimination play a crucial role in carrying out the important *national* policy against discriminatory employment practices through work-sharing agreements with the EEOC. *See Shaw v. Delta Airlines,* 463 U.S. 85, 101 (1983); 29 C.F.R. § 1601.74. "State laws obviously play a significant role in the enforcement of Title VII." *Shaw,* 463 U.S. at 101. The EEOC files suit in only a fraction of cases, even when EEOC has found probable cause to believe discrimination has occurred. *Gilmer,* 500 U.S. at 28. Under Article 49B, MCHR pursues administrative remedies by certifying the case for public hearing and filing a statement of charges for *every case in which probable cause has been found* whenever the case cannot be conciliated. MD. REGS. CODE tit. 14.03.01.08A & B. That state agencies and their laws play an important role in the federal Act's enforcement strongly militates against any limitation on their ability to obtain "make whole" relief in state administrative proceedings. To rule otherwise would seriously undermine the state *and* federal enforcement of Title VII under the work sharing agreements by removing a key enforcement agency. *See Shaw,* 463 U.S. at 101-104 (1983).

In *Shaw*, this Court held that the federal Employee Retirement Income Security Act of 1974 (ERISA) did not preempt New York's human rights and disability benefit laws even though ERISA expressly preempted all state laws relating to disability plans.[4] The appellant argued that "preemption of state fair employment laws would impair and modify Title VII because it would change the means by which it was *enforced*." *Shaw* 463 U.S. at 101 (emphasis added). The Court agreed. In so doing the Court recognized that:

> Given the importance of state fair employment laws to the federal enforcement scheme, pre-emption of the Human Rights Law would impair Title VII to extent that the Human Rights Law provides a means of enforcing Title VII's commands . . . . If ERISA were interpreted to pre-empt the Human Rights Law entirely with respect to covered benefit plans, the State no longer could prohibit the challenged employment practice and the state agency no longer would be authorized to grant relief. The EEOC thus would be unable to refer the claim to the state agency. This would frustrate the goal of encouraging joint state/federal enforcement of Title VII; an employee's only remedies for discrimination prohibited by Title VII in ERISA plans would be federal ones.

[4] ERISA preempts "any and all laws insofar as they may now or hereafter relate to any employee benefits plan" covered by ERISA. 29 U.S.C. sec. 1144(a). The section goes on to provide that "[n]othing in this title shall be construed to alter, amend, modify, invalidate, impair, or supercede any law of the United States ...or any rule or regulation issued under any such law." sec.1144(d).

Id. at 102; *See also, New York Gaslight Club*, 447 U.S. at 63-64 ("Congress envisioned that Title VII's procedures and remedies would [mesh] nicely, logically, and coherently with the State and city legislation, and that remedying employment discrimination would be an area in which [the] Federal Government and state governments would cooperate effectively.")(quotations and citation omitted). Given the necessity of state administrative procedures to the enforcement of Title VII, unwarranted federal interference with the enforcement of state anti-discrimination laws would also seriously undermine enforcement of Title VII.

CONCLUSION

For all the forgoing reasons, Amici respectfully request that this Court reverse the decision of the United States Court of Appeals for the Fourth Circuit holding that an arbitration agreement between a charging party and his employer bars EEOC from seeking backpay, reinstatement, and compensatory and punitive damages under Title VII. In the event the Court affirms the decision of the Fourth Circuit, Amici respectfully request that

the Court make explicit that the decision does not apply to state anti-discrimination statutes.

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